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IN THE

Supreme Court of the United States

October Term, 1983

GEORGE G. DAVIS and I. D. T. CORPORATION,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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(14066)

QUESTION PRESENTED

1. Whether this Court should resolve the irreconcilable conflict between the Second and Ninth Circuits as to whether estoppel can only apply against the Government if there are affirmative acts of misconduct, or fraud, by a Government official, or whether it will also apply if the Government official should have acted, and failed to do so, together with the other elements of estoppel, to wit, ignorance of the relying party, to the latter's injury.

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1. The parties to the proceedings in the United States Court of Appeals for the Second Circuit are George G. Davis and Intersystems Design and Technology Corporation hereinafter referred to as I.D.T. Corp. against the United States of America.

I.D.T. Corp. is wholly owned by George G. Davis, and has neither parent or subsidary companies.

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v.

UNITED STATES OF AMERICA
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners GEORGE G. DAVIS (Davis) and I.D.T. CORP. respectfully prays that a Writ of Certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Second Circuit (Second Circuit) entered on March 15, 1983.*

OPINIONS BELOW

The opinion and judgment below of the Second Circuit appears in the Appendix commencing at (A-1). The opinion is officially reported at 702 F2d 418 (2nd Cir 1983).

The order of the United States District court for the Southern District of New York, which were affirmed by the Second Cir-

* The Second Circuit stayed the issuance of its mandate pending decision by this Court of this petition for writ of Certiorari:

cuit, appear in the Appendix at (A-3). The District Court did not write an opinion.

The oral decision of the Bankruptcy Court is printed in the Appendix at (A-10).

The order of the Bankruptcy Court is printed in the Appendix at (A-28).

JURISDICTION

The opinion and judgment of the Second Circuit of which review by this Court is sought was entered on March 15, 1983. The jurisdiction of this Court to review the judgment below exists pursuant to 28 U.S.C. 1254(1).

EXISTENCE OF JURISDICTION BELOW

The Courts below exercised jurisdiction of this matter under the United States Bankruptcy Act—Chapter XI, and various Rules thereof.

In each instance the issue of estoppel was raised by Petitioners and rejected by the Bankruptcy Judge (A-24), the District Court (A-30) and the 2nd Circuit (A-9).

STATEMENT OF THE CASE

The Second Circuit's decision has necessitated this petition for writ of certoriari to resolve the conflict between the Second and Ninth Circuits as to whether affirmative misconduct by a Government official, which would give rise to estoppell, must be some positive act, such as fraud, or lying by a Government official, or, whether the failure to act, upon proper notice to the Governmet official, will also give rise to estoppell.

This case commenced on March 3, 1978, when Frigitemp Corporation filed a Petition in Bankruptcy (Chapter XI). Shortly

thereafter, the United States Attorney for the Southern District of New York as well as the Securities and Exchange Commission, commenced a criminal investigation into the facts and circumstances surrounding the Bankruptcy.

In addition to commencing a criminal investigation into the Frigitemp Bankruptcy, the Government filed claims against the Frigitemp estate in February of 1979. Periodically thereafter, the Government filed various other documents in connection with their status as a creditor of the Estate. Thus, both the Criminal and Civil Divisions of the United States Attorney's Office for the Southern District of New York were aware of and became involved in the Frigitemp Bankruptcy between March of 1978 and February of 1979.

In August, 1980, the Government became aware that petitioner George Davis was under investigation by the Trustee in Bankruptcy. At that time, the Trustee filed an application to have Davis designated under the Bankruptcy Act. Section 7(a) and 7(b) in connection with a Rule 205 examination, and to produce books and records of IDT.

On September 2, 1980, the U.S. Attorney then in charge of the Frigitemp Criminal investigation, Michael Q. Carey, advised U.S. Bankruptcy Judge Lewittes that he had no objection to the section 7(a) and 7(b) designation for Mr. Davis, and by separate letter of September 5, 1980, acknowledged that Mr. Davis was the subject of a criminal investigation by that office. Furthermore, on September 25, 1980, Mr. Carey advised my office that Davis was a target of their investigation and that a subpoena would be issued to him for records in October 1980.

On June 12, 1980, Judge Lewittes signed a Protective Order, in connection with the Trustee's investigation of Mr. Davis. The Government was aware of the existence of the Protective Order by virtue of the fact that the Order signed by Judge Lewittes on September 5, 1980, designating Davis under the Bankruptcy Act, mentioned the Protective Order, and the Government, after receipt of notice to designate Davis under the Bankruptcy Act failed to file any objection. On September 5, 1980, Judge Lewittes signed an order, designating George G. Davis pursuant to Bankruptcy Act Section 7(a) (10) and 7(b), and directing that confidential information as defined in the Protective Order,

including the books and records under subpoena, and testimony about or derived from such confidential information, would be subject to the terms of the Protective Order, and that the entire transcript of the examination be placed and maintained under seal. Also, on September 5, 1980, upon the application of the United States Attorney for the Southern District of New York, by Michael Q. Carey, Administrative Assistant United States Attorney, Judge Lewittes signed an order to the effect that the testimony of Davis given under a grant of immunity could not be communicated by anyone who learns of its text or substance either directly or indirectly to anyone in the Office of the United States Attorney for the Southern District, or to anyone in the Office of any federal criminal investigative agency, without prior written approval of the Bankruptcy Court. At the time the Protective Order and the Order designating Davis under the Bankruptcy Act were signed, the Government had not issued any subpoenas to Davis, or any of his companies for records, nor had any subpoena been issued to Davis to testify before a Grand Jury, even though the Government's criminal investigation had been commenced more than two years earlier, and Mr. Davis was clearly a target of the criminal investigation.

On April 16, 1981, an Order to Show Cause was issued by Judge Lewittes, giving notice of a hearing that would be held on April 28, 1981, in connection with an application to approve a Settlement Agreement between the Trustee and Davis and I.D.T. The order to Show Cause together with a Notice of Hearing on Application for an Order Approving the Settlement Agreement, was served upon, among others, the United States Attorney for the Southern District of New York, since the Government was a creditor, pursuant to Bankruptcy Rule 203(a) (3), (f) and (g). The Notice of Hearing contained a provision advising the recipients that the Settlement Agreement and Settlement Documents were on file in the office of the Bankruptcy Clerk. The Notice of Hearing futher provided that if the recipients had any objections to the Trustee's Application for an order approving the Settlement Agreement, such objections had to be submitted in writing not later than three business days prior to the return date of the Order to Show Cause, i.e., April 28, 1982. Neither the United States Attorney for the Southern District of New York nor any of the other interested parties filed any

objections to the Settlement Agreement, which incorporated both the Protective Order and Sealing Order previously issued by the Bankruptcy Court. In view of lack of objection, Judge Lewittes after a hearing approved the Settlement Agreement on April 28, 1981.

On January 28, 1982, almost four years after commencement of the Government's investigation, approximately seventeen months after issuance of the Protective Order and Sections 7(a)(10) and 7(b) designation, with sealing provision, of Davis, and approximately nine months after approval of the Settlement Agreement which the Government did not object to, and which incorporated both the Protective Order and the Sealing Provision, the Government issued a subpoena to Davis and I.D.T. The subpoena demanded documents encompassed within the Protective Order as well as documents actually utilized in the Rule 205 examination of Davis which were under seal. As previously indicated, both the Protective Order and sealing provisions were contained in the Settlement Agreement which was approved by the Bankruptcy Court after the Government had failed to make any objections to the provisions of that Agreement.

PROCEEDINGS BELOW

On March 2, 1982, the Government obtained an Order to Show Cause returnable in Bankruptcy Court, Southern District of New York, before Judge Lewittes to obtain access to certain records sealed by the Bankruptcy Court and authorizing production of certain records covered by a Settlement Agreement.

On March 5, 1982, a hearing was held before Judge Lewittes and the matter was adjourned to March 25, 1982, for argument on the Order to Show Cause. Subsequently, on September 21, 1982, Judge Lewittes rendered an oral decision (A-10), which was followed by a written Order dated September 29,1982, (A-28) and affirmed by the District Court (Broderick, J) on November 12, 1982, (A-30).

Petitioners appealed to the Second Circuit from the November 12 orders of Judge Broderick. Judge Broderick did not file a written opinion.

The Second Circuit affirmed the decision of the District Court on March 15, 1983. Thereafter, the Second Circuit granted a stay of the mandate pending petition for writ of certiorari.

REASONS FOR GRANTING THE WRIT

1. The clear and irreconcilable conflict between the Second Circuit and Ninth Circuit as to what type of Government misconduct will give rise to Estoppel.

The Second Circuit has noted this difference of Circuit views regarding estoppel, and, in particular the conflict with the Ninth Circuit. *Goldberg v. Weinberger* 546 F2d 477 (2nd Cir. 1978). However, before going into these differences consideration should be given as to the type of Government misconduct which occurred in the instant matter. It should be noted the Trustee in Bankruptcy had good reasons for advising the Settlement Agreement should be accepted. A reading of the provisions of the Trustee's Application for approval of the Agreement sets forth the advantages for the Trustee, and those he represented. Petitioner, likewise, after conferring with counsel, recognized litigation would end, releases obtained and the Sealing provisions of the Agreement would be observed by all parties who were served and did not object to the Agreement. Petitioner knew the Government had been served, and they knew or should have known, of the Protective Order and Sealing provisions of the Agreement. No objections were heard from the Government, and petitioner, as well as Counsel, could rely on the terms of the Agreement as being in force. Had the Government objected there would have not been a Settlement Agreement. However, in less than one year from the date of the Agreement, the Government sought, and still seeks, to overturn the Agreement in principal part. The Government should be estopped from doing so.

It is established that the doctrine of estoppel is available if the following four elements exist:

1. The party to be estopped must know all the facts;

2. The Government must intend that its conduct shall be acted on, or must show that the party asserting the estoppel has a right to believe it is so intended;

3. The latter must be ignorant of the true facts; and

4. He must rely on the former's conduct to his inquiry. *Lavin v.* **Marsh,** *644 F2d 1378, 1382 (9th Cir. 1981),* **United States** *v. Wharton,* 514 F.2d 406 (9th Cir. 1975).

In the instant case it is submitted all the above four elements do exist. Clearly, based on the above background of the Government's continued interest in this case it knew all of the facts. In fact, Judge Lewittes, in his opinion (A-23) accepted petitioner position on this point. As to the second, the Government did not object to the Protective Order of Sealing provisions, and Davis had every right to believe these provisions were to be enforced. As to element three, to be successful, Davis would have to establish that when the Government accepted the Protective Order and Sealing provisions in April 1981, it had intentions of issuing the instant subpoena and overturning the Protective Order and Sealing provisions. This too can be established since in September 1980, a member of my firm had a meeting with Assistant United States Attorney Carey, to discuss this case. While the Assistant would not discuss any facts or evidence involved in this case as he was correct in doing, and, in fact, was not asked for such information, he did give some general advice. He did advise Davis was a target of the investigation. That Davis would not be personally served. That a subpoena for books and records would be issued to I.D.T. within a month, that is in October 1980. After a period of over six months had passed, and with notice given to the Government of the terms of the Settlement Agreement together with no objections from the Government, the petitioner relied on the fact these records were to remain sealed, and not to be subpoenaed. Furthermore, as to this third element Judge Lewittes again accepted it as fact for the purpose of his opinion (A-23). Lastly, as to the final element, Davis has incurred injury, in that he paid 1.4 million dollars for these provisions in a Settlement Agreement, and which Davis had relied upon as binding on the Government, based on the actions of the Government.

It has been a fairly recent occurrence that Government officials have been estopped from taking certain action. However,

the United States Supreme Court in 1973 held that affirmative misconduct on the part of the Government officials could invoke the doctrine of estoppel, *Immigration and Naturalization Service* v. *Hibi* 414 U.S. 5 (1973). What constitutes affirmative misconduct has been considered a slippery term, *Santiago* v. *Immigration and Naturalization Service*, 526 F.2d 488 (9th Cir. 1975), cert. den. 425 U.S. 971 (1976). It has been considered to be a crucial misstatement made by a Government official, *Brandt* v. *Hickel*, 427 F.2d 53 (9th Cir. 1970). But it has also been considered as not only the act of admission, but also the failure to inform or inquire, and, thus, an act of nonfeasance as well as misfeasance (*Santiago*, supra, at pg. 493). Again, affirmative misconduct can be affirmative concealment of a fact by the Government, as well as an affirmative misrepresentation. *United States* v. *Ruby Co.*, 588 F.2d 697 (9th Cir. 1978), cert. den. 442 U.S. 917 (1979).

Furthermore, the Government was a creditor in this case and, thus, under Rule 203 of the Bankruptcy Rule service of process was made upon the United States Attorney. As a creditor, or a claimant, the Government then had a duty and responsibility to reply to whatever provisions in the Settlement Agreement were objectionable, or be bound by its terms. The Government, although on notice, filed no objections.

A failure to inform, when obligated to do so can constitute affirmative misconduct on behalf of the Government (*Santiago*, supra, at pg. 493), which is what occurred in this case.

It is accepted that estoppel should be applied against the Government with utmost caution and restraint, *Schuster* v. *C.I.R.*, 312 F.2d 311 (9th Cir. 1962). But it is also true the estoppel doctrine is applicable to the United States where justice and fair play require it, *United States* v. *Lazy F.C. Ranch*, 481 F.2d 985 (9th Cir. 1973). The Court further ruled that it would consider the defense of estoppel against the Government where basic notions of fairness required the Court to do so. It is submitted such notions are evident in the instant case. Furthermore, estoppel is a rule of fairness by which courts protect the reliances and expectations of innocent persons from default by

those who have induced those reliances and expectations, *Russel* v. *Texas Co.*, 238 F.2d 636 (9th Cir. 1956).

The Second Circuit Court of Appeals recognizes the doctrine of estoppel applies to the Government, *Hansen* v. *Harris*, 619 F.2d 942 (2nd Cir. 1980). While this decision was reversed, it was not on the ground the doctrine did not apply, *Schweiker* v. *Hansen* 450 U.S. 785 (1981). In *Hansen*, the Second Circuit found that estoppel would only apply where there is some positive act of fraud or affirmative misconduct. The Ninth Circuit in *Santiago*, supra would apply estoppel where there is a failure to act. The reason for this conflict is noted in *Schweiker*, supra at page 689, since this Court states it has never decided what type of conduct by a Government employee will estop the Government. The dissenting opinion in *Schweiker*, supra at page 692, recognizes it is time to define what constitutes affirmative misconduct. It is to resolve this issue that this Petition should be granted.

CONCLUSION

The decision below is appropriate for review by ths Court for the reasons stated herein, and Petitioner prays that a writ of certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Second Circuit.

June, 1983

Respectfully submitted.

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 840 - August Term 1982
(Argued January 14, 1983 Decided March 15, 1983)
Docket Nos. 82-5041, 82-5043

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

-against-

GEORGE C. DAVIS, IDT CORP. and GENERAL DYNAMICS,
Defendants,

GEORGE C. DAVIS and IDT CORP.,
Defendants-Appellants,

and

P. TAKIS VELIOTIS,
Intervenor-Appellant.

Before:

FEINBERG, Chief Judge
CARDAMONE and DAVIS*, Circuit Judges

Appeal from orders of the United States District Court for the Southern District of New York (Broderick, J.) which required production of testimony and documents subpoenaed by a grand jury despite claims of confidentiality.

Affirmed.

MATTHEW L. BYRNE, New York, New York (Hollman & Byrne, New York, New York, of counsel), *for Appellants Davis and IDT Corp.*

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* United States Circuit Judge, United States Court of Appeals for the Federal Circuit, sitting by designation.

JOHN H. GROSS, New York, New York (Andersen Russel. Kill and Olick, P.C., New York, New York, of counsel, For *Appellant Veliotis*.

DAVID W. DENTON, Assistant United States Attorney, New York, New York (William M. Tendy, Acting United States Attorney for the Southern District of New York, Walter P. Loughlin, Assistant United States Attorney, New York, New York, of counsel), *for Appellee*.

CARMADONE, *Circuit Judge*:

The conflict between protection of privacy interests of litigants in confidential material submitted in a civil proceeding and public needs of the grand jury in a criminal investigation is neatly posed by this appeal. Here grand jury subpoenas duces tecum seek to compel production of evidence used in a bankruptcy proceeding—the transcript of a witness' deposition and certain corporate records. Appellants have resisted compliance, claiming that an agreement of confidentiality regarding the deposition and a settlement agreement, which placed the corporate records under a protective order and directed them sealed, shield these items from compelled production.[1]

I

We sketch briefly the background from which this case arose. Frigitemp, a New York corporation formerly engaged in marine construction, did substantial business with General Dynamics Corporation, including subcontracting work on vessels being built by General Dynamics at its shipyards in Quincy, Massachusetts. At the time when Frigitemp was involved in subcontracting, P. Takis Veliotis was General Manager of the General

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[1] The seal on those papers previously filed with this Court, i.e., the Government's moving papers and the responsive papers of appellants Davis, IDT and General Dynamics Corp., is to the limited extent required by this opinion lifted. A motion made by General Dynamics to keep the record before us sealed and for other relief is similarly denied to the same extent.

Dynamics Quincy Shipbuilding Division, and George C. Davis was serving as Senior Vice President of Frigitemp in charge of its Quincy subcontracting work. In early 1978 Davis formed a new corporation—appellant Intersystems Design and Technology Corporation (IDT) - and a month or so later Frigitemp filed a petition in bankruptcy in the Southern District of New York. General Dynamics promptly terminated Frigitemp's Quincy subcontracts and awarded them to IDT.

Shortly after Frigitemp filed its petition, the United States Attorney for the Southern District of New York commenced a criminal investigation into the circumstances surrounding the bankruptcy. In January 1980 Bankruptcy Judge Lewittes of the Southern District of New York authorized the trustee in bankruptcy of the Frigitemp estate to investigate causes of action available to the estate, including so-called "business crimes"[2] involving Davis, IDT and several General Dynamics employees. In February 1980 the trustee, utilizing the provisions of Bankruptcy Rule 205, sought to examine General Dynamics by deposing several of its employees, including Veliotis. Because the parties were located in Quincy, ancilliary proceedings were conducted before the Bankruptcy Court for the District of Massachussetts. Those to be deposed appeared by counsel who requested a protective order. After a series of hearings before Bankruptcy Judge Lavien of the District of Massachusetts, an "understanding" was reached that afforded limited protection to portions of the testimony and accompanying documents which were later to be designated as containing confidential business information and/or scurrilous allegations of crime.

The Southern District Bankruptcy Court, in June 1980, approved a protective order which restricted the trustee's access

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[2] The use of the words "so-called business crimes" appearing in this record is an unfortunate euphemism. The words suggest that actions, ordinarily considered criminal, that occur in a business setting somehow are not real crimes, but merely corporate transgressions. Of course, no such distinction exists in the law. Shakespeare resolved a failure to call by name that which something is by saying: "that which we call a rose by any other name would smell as sweet." [Romeo and Juliet, Act II, scene ii]. Similarly, a crime by any other name is still a crime and should be so titled.

to and use of confidential information contained in business records belonging to Davis and IDT. The trustee was only allowed to view these records in counsel's office and could not make copies. However, paragraph 9 of the order provided that "Nothing herein shall preclude IDT from disclosing any confidential information to any person or entity."

In April 1981 a settlement agreement was reached between Davis, IDT and the trustee which required IDT to pay $1.4 million to the Frigitemp estate. It also required the trustee to turn over to IDT all his copies of transcripts of the examinations taken under Rule 205 and exhibits marked at those examinations. The originals were filed with the Clerk of the Bankruptcy Court under seal until the Frigitemp estate was closed, at which time they were to be destroyed.

A grand jury is currently investigating the claimed diversion of $5 million from Frigitemp through bribery, alleged kickbacks, embezzlement and fraudulent misappropriation by means of fictitious invoices and contracts. Appellant Davis is a target of this investigation. In early 1982 grand jury subpoenas duces tecum (which are the subject of this appeal) were issued to Davis and IDT requiring production of the corporate documents discussed above. A similar subpoena was issued to General Dynamics calling for the production of a variety of documents, including the transcript of Veliotis' testimony taken at the Rule 205 examination. The government also moved the Bankruptcy Court for an order permitting it access to the materials under seal.[3] General Dynamics has turned over all the requested records in its possession except the Veliotis transcript. Davis has produced some but not all of the records subpoenaed from him and IDT.

Veliotis was permitted to intervene in order to argue against production of his testimony. On appeal he asserts that General Dynamics need not turn over to the grand jury the transcript of his Rule 205 testimony because he relied on the understanding of confidentiality described above before agreeing to testify.

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[3] The government does not seek production of Davis' testimony, which was given under a statutory grant of immunity.

Davis and IDT contend that the terms to the protective order of June 1980 shield them from any obligation to produce the subpoenaed corporate documents; they also urge that the settlement agreement and consequent sealing by the Bankruptcy Court forecloses access by the United States Attorney and the grand jury to those sealed documents in the Clerk's custody.

II

In pressing their arguments before us appellants rely heavily on our decision in *Martindell v. International Telephone and Telegraph Corp.*, 594 F2d 291 (2d Cir. 1979) (Mansfield, J.). In *Martindell* we were faced with the government's formal and informal attempts to secure evidence covered by a Federal Rule of Civil Procedure 26(c) protective order issued in a civil suit to which it was not a party. In our analysis we stated that the function of a Rule 26(c) protective order is to "secure the just, speedy, and inexpensive determination" of civil disputes. We also noted the policy consideration that encouragement of full disclosure of all relevant evidence is a key objective in the true administration of justice. The court recognized that without enforcement of a Rule 26(c) protective order witnesses might frequently refuse to testify if the government, in disregard of the order, could use the witnesses' testimony for criminal investigatory purposes. *Id.* at 295-96.

Regarding the government's efforts to obtain the information in *Martindell* by means of a telephone call and letter to the court, we held that the government's power to investigate, including the use of the grand jury process, cannot be enhanced by such attempts to circumvent a protective order issued in a civil suit. We thus rejected the government's informal attempt to insinuate itself into private litigation.

The government, after being granted the status of a permissive intervenor, formally sought modification of the protective order to allow it access to certain disposition testimony. Since the deposed witnesses in *Martindell* had testified in reliance on confidentiality guaranteed by a formal protective order, the

government's motion for modification was denied. The court reasoned that the government had failed to show the element of extraordinary need necessary to obtain modification of a protective order because it still had available its usual arsenal of investigatory weapons, including use of the grand jury process. Specifically reserved was the issue of whether the government might be entitled to enforcement of a subpoena compelling production of civilly protected depositions. *See Martindell*, 594 F.2d at 296 n.6.

Ranged against these considerations are the reasons for permitting the grand jury broad subpoena power in a criminal investigation. The awesome power of the government to use the inquisitional function of the grand jury in the compulsion of witnesses' attendance before it has been recognized since our country's founding. *Blair v. United States*, 250 U.S. 273, 280 (1919). The grand jury's authority to subpoena witnesses because "the public . . . has a right to every man's evidence" is essential to its task. *Branzburg v. Hayes*, 408 U.S. 665, 688 (1972). A grand jury has wide ranging authority to inquire into suspected violations of the criminal law; and to effectuate such investigations it may compel the production of documentary evidence or the testimony of witnesses, as it deems necessary. *See United States v. Calandra*, 414 U.S. 338, 343 (1974). While the power to summon and the correlative duty of the person summoned to appear is subject to some exceptions, *see Branzburg*, 408 U.S. at 688, *e.g.*, a Fifth Amendment claim of self-incrimination, the scope of the grand jury's power to investigate is not narrowly limited, *see Blair*, 250 U.S. at 282. Wide latitude in gathering evidence is vital to the grand jury's investigative function. Every piece of information bearing on the investigation has importance in the deliberations since the nature of the crime and the identity of the accused are decisions made by the grand jury at the conclusion of its inquiry, not at the beginning. *See id.* at 282.

III

Veliotis' reliance on *Martindell* is misplaced because his situation is entirely different from that presented in our prior decision. A brief review of the manner in which the "understanding

of confidentiality" was reached in this case demonstrates this. On the morning of February 19, 1980, prior to the examination of Veliotis, counsel for General Dynamics requested of Judge Lavien that "the papers in this proceeding," particularly an affidavit and memorandum filed by the trustee and the transcript of the instant discussion, be placed under seal because of "allegations that have been made about individuals at General Dynamics" which were "inappropriate and scandalous." The trustee's attorney consented, except that he wanted the documents to be available "to the Courts." Judge Lavien suggested that the lawyers draw up a stipulation. Later that day General Dynamics counsel requested that any documents supplied be maintained "on a confidential basis" and "under a stipulation of confidentiality" because they included "confidential business information." The court responded that this was not customary and that the record in this case was not such as would require that everything be sealed. Judge Lavien then instructed counsel for General Dynamics that anything produced which counsel thought contained any "proprietary or confidential business information" should be so labeled and, absent disagreement from the opposition, would not be "made available for public dissemination." Significantly, no stipulation of confidentiality was ever reduced to writing, no formal protective order was ever issued by Judge Lavien, and no documents or testimony were ever designated as containing proprietary or confidential business information.

Thus, while *Martindell* involved a formal protective order issued under Rule 26(c), here there was simply an "understanding of confidentiality." Further, the government in *Martindell* was proceeding outside of its usual investigative powers to secure the requested testimony, not by grand jury subpoena.

Finally and most crucially, there is no indication that Veliotis agreed to testify only in reliance on the "understanding." He has not shown us any evidence that he ever designated any of his testimony as containing confidential information, as required by the "understanding." He now claims that the understanding extended beyond that reached in court, due to an alleged out-of-court agreement between counsel. But a court cannot be

expected to enforce an agreement of this nature which was never placed before it for approval and which has not even been reduced to writing. Were Veliotis truly concerned about his Fifth Amendment privilege, he would have insisted on something more than an out-of-court discussion or the very limited "understanding" outlined by Judge Lavien, before he agreed to testify. He could, for instance, have asserted his Fifth Amendment privilege at the time. *Cf. Garner v. United States*, 424 U.S. 648, 653-56 (1976) (under certain circumstances, failure to claim a Fifth Amendment privilege constitutes waiver of the privilege). His argument that he did not believe it necessary to claim the constitutional privilege because of his reliance on the "understanding" is undercut by the fact that he apparently never availed himself of the protection afforded him. He has not shown that he in any way indicated which portions of his testimony were confidential and thereby included within the coverage of the understanding. Consequently, his argument that his Rule 205 testimony is "arguably" self-incriminating is now ineffectual.

IV

We next consider the claims of Davis and IDT. As for the copies of the requested documents sought directly from Davis and IDT, paragraph 9 of the protective order, relied on by appellants to resist compliance, itself permits dissemination of these papers to anyone, *i.e.*, to the grand jury.

As for those copies under seal in the Bankruptcy Court, access to sealed court records is ordinarily obtained by a request addressed to the discretion of the trial court which determines the question in light of the relevant circumstances, *cf. Nixon v Warner Communications, Inc.*, 435 U.S. 589, 599 (1978) (upheld district court's denial of access by third party to former President's tapes used in previous court proceedings). In view of the fact that paragraph 9 of the protective order specifically permitted IDT to disclose "to any person or entity" information contained in the same corporate documents sought from the court, modification of the sealing order was well within the

lower court's discretion. Moreover, these records existed prior to the advent of the litigation and before the settlement agreement, which also contains a sealing provision, was entered into. As such they were previously subject to subpoena and cannot now be protected from grand jury review simply because the parties to the agreement saw fit in their own private interests not to reveal this corporate material to the public. A court may direct access to such material upon a proper showing of need. Here such a showing was amply demonstrated. To have refused access to these records in the face of a subpoena from a grand jury would have been an abuse of discretion. *Cf. Ex parte Uppercu*, 239 U.S. 435 (1915) (Holmes, J.) (mandamus lies to compel a judge to unseal documents shown to be material and necessary in litigation, absent a demonstrated privilege.[4]

The orders are affirmed.

[4] An estoppel argument raised by Davis and IDT is without merit.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
(In Bankruptcy)

No. 78 B 468

In the Matter of
FRIGITEMP CORPORATION,

Bankrupt

United States Court House
Foley Square, New York, N.Y.
September 21, 1982
1:00 o'clock p.m.

DECISION BY HON. JOEL LEWITTES IN CONTESTED MATTER RE: GENERAL DYNAMICS, GEORGE DAVIS AND IDT

Before:

HON. JOEL LEWITTES,
Bankruptcy Judge

BARRY W. RAYVID
Official Court Reporter
U.S. Courthouse (R.202)
Foley Square, New York, N.Y. 10007

APPEARANCES:

WILLIAM TENDY, ESQ.
Acting United States Attorney
For the Southern District of New York
1 St. Andrews Plaza
New York, New York

BY: DAVID DENTON, ESQ.
Assistant United States Attorney
-and-
SETH TAUBE, ESQ.
Assistant United States Attorney

GELBERG & ABRAHMS, ESQS.
Special Counsel for Lawson Bernstein,
Trustee of Frigitemp Corporation
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BY: WILLIAM L. GARDNER, ESQ., Of Counsel

HOLLMAN AND BYRNE, ESQS.
Attorneys for George Davis
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New York, New York 10106

BY: MATTHEW L. BYRNE, ESQ., Of Counsel
-and-
DANIEL HOLLMAN, ESQ., Of Counsel

PROCEEDINGS

THE COURT: The Government, by the United States Attorney, brought this matter for resolution to this Court by way of an order to show cause in accordance with the provisions of Bankruptcy Rule 914 relating to contested matters, and the Government moved this Court for an order permitting access and presentation to the Grand Jury of certain documents that have been sealed and deposited with the Clerk of the Bankruptcy Court.

These documents were sealed pursuant to a settlement agreement and a protective order, which I will discuss further on this oral opinion.

Additionally, at the hearing on the Government's order to show cause the United States Attorney requested this Court to

authorize the production by General Dynamics Corporation pursuant to a Grand Jury subpoena duces tecum issued to that corporation of any deposition transcripts and documents obtained by Frigitemp Corporation's Trustee in bankruptcy in connection with certain Bankruptcy Rule 205 examinations of General Dynamics conducted by the Trustee.

In particular, the Government by this contested matter seeks the following documents:

Number one, it seeks documents from Intersystems Design And Technology Corporation, which will be referred hereinafter as IDT, and/or George Davis sought directly from them by the Grand Jury subpoena;

2. The Government seeks from General Dynamics documents and transcripts of Bankruptcy Rule 205 examinations of General Dynamics' employees sought directly from General Dynamics by the Grand Jury subpoena; and, finally, the Government seeks

3. Certain documents in the Trustee's files required by the Grand Jury subpoena other than those sought from Davis, IDT or General Dynamics.

These documents presently are under seal pursuant to the settlement agreement.

It appears that by order of this Court, dated January 23, 1980, the Trustee was granted the right to commence certain investigations into the acts, conduct and property of the now bankrupt, Frigitemp Corporation.

Thereafter, on February 5th of 1980 the Court permitted the Trustee to undertake Bankruptcy Rule 205 examinations of General Dynamics Corporation in furtherance of the investigation.

Since General Dynamics is situated beyond the territorial effect of a subpoena issued for the Rule 205 examination—and the territorial effect of 205 subpoenas is coincident with Rule 45 of the Federal Rules—the Trustee filed in the Bankruptcy Court of Massachusetts an application for ancillary examinations. And, ancillary jursidiction is conferred by former Bankruptcy Act

Section 2a (20) and, of course, we are dealing with the Bankruptcy Act of 1898 since this matter was filed in this Court prior to the effective date of the Bankruptcy Reform Act of 1898.

It is clear that Section 2a of the former Bankruptcy Act permits an ancillary Court to make orders "for the examination of witnesses concerning the acts, conduct or property of the bankrupt in and of the bankruptcy proceedings."

Thereafter, the Massachusetts Bankruptcy Court issued subpoenas duces tecum to General Dynamics and several of its officials and employees. Following an objection to the subpoenas and a request for a protective order by the subpoenaed parties, an "understanding of confidentiality" was reached during the course of a series of hearings before Massachusetts Bankruptcy Judge Lavien.

Thereafter, the Trustee did, in fact, proceed with the 205 examinations of the subpoenaed parties. In May, 1980, pursuant to an order of this Court, the Trustee was authorized to undertake another Rule 205 examination, this time of IDT, and on July 12, 1980 a protective order was issued by this Court which sealed all documents and information transmitted to the Trustee at the aforesaid Rule 205 examinations designated as confidential by IDT, that is, the documents and information so designated.

In April, 1981 this Court, after a hearing, granted an order approving a settlement agreement among the Trustee, one George G. Davis and IDT, dated April 14, 1981, wherein in exchange for one million four hundred thousand dollars paid to the Trustee on behalf of the bankrupt estate, the Trustee agreed to settle its alleged claim against Davis, IDT and certain named releasees. As set forth in the settlement agreement, that list of releasees includes General Dynamics Corporation, and IDT, as well as person deposed at the Rule 205 examinations of each of those corporations.

In accordance with the terms of the settlement agreement the Trustee was required to turn over to IDT all copies of transcripts of the Rule 205 examinations of any of the releasees and all documents provided at or in connection with such examinations.

Additionally, the original transcripts and documents were to be kept by the Clerk of this Court under seal and to be destroyed upon the closing of the Frigitemp estate.

It should be noted that prior to the instant application Equitable Life Assurance Society of the United States, not a party to these settlement agreements, unsuccessfully sought in this Court modification of the protective order provisions of that agreement, and that case has been reported at 15 Bankruptcy Reports, page 283.

Finally, with respect to the settlement agreement, it should be indicated that notice of the Trustee's application for an order approving the settlement agreement was made upon the bankrupt's creditors committee, the District Director of Internal Revenue and the United States Attorney for the Southern District of New York. No objection to the settlement agreement was entered by any of the parties or by any of the persons or entities given notice of the Trustee's application.

With respect to the contentions of the parties, I will first examine those contentions raised by IDT and George Davis. IDT and George Davis assert that the documents sought from them here by the Government were covered by the July 12, 1980 protective order and the April 14, 1980 settlement agreement approved by this Court. Their resistance in the main is grounded upon the general policy that protective orders and Court-approved settlement agreements ought to be observed and enforced particularly, where as here the parties have relied upon their enforceability.

And, to a great extent, both IDT and George Davis relied upon a decision by the Second Circuit Court of Appeals in Martindell v. International Telephone & Telegraph Corporation, 594 F. Sec., 291, specifically at page 296, and that case was decided by the Second Circuit in 1979.

Moreover, both IDT and Davis assert that the Government's delay in seeking the instant documentation in connection with the latter's ongoing investigation of Frigitemp or with the Trustee's investigation of Frigitemp, as well as the Government's

failure to object to the Court's approval of the settlement agreement, forecloses the Government on the bases of laches and estoppel from now obtaining the relief requested by the Government here.

General Dynamics has refused to produce documents of the Massachusetts 205 examinations taken of it and its personnel as well as the documents delivered to the Trustee in connection with those examinations. It appears that General Dynamics has turned over some documents to the Government in accordance with a Grand Jury subpoena. General Dynamics resists the Government's motion here on the ground that the transcripts and the documents are subject to that understanding of confidentiality, referred to earlier, reached in the Massachusetts Bankruptcy Court and, accordingly, may not be disclosed to third parties.

Furthermore, General Dynamics maintains that this Court's order approving the settlement agreement should be deemed to insulate it from the Government's instant application with respect to copies of those depositions and documents held by General Dynamics or its personnel. In the event, says General Dynamics, that this Court does not interpret the order approving the settlement agreement to afford General Dynamics that protection we are requested by General Dynamics to modify that order to expressly require that those copies held by General Dynamics are protected by the umbrella of confidentiality.

The Government, of course, recognizes, when appropriate, the utility of protective orders between private parties. But such orders, it argues, may be modified particularly where, as here, the public interest, that is, the Grand Jury, requires full disclosure.

Moreover, since the protective orders and the settlement agreement deny disclosure by the Trustee, the Government maintains it can obtain the bulk of the material sought by it from IDT, Davis and General Dynamics without modifying the order and agreement.

Accordingly, any other documents required from the Trustee would amount to a minimal modification. Finally, the Govern-

ment argues that it is not barred under the doctrines of laches and estoppel from the relief it requests here.

In objecting to the Government's right to the requested documents—and I am now turning my direction and attention to the IDT and Davis argument objecting to the Government's right to the requested documents—Davis and IDT, as I indicated earlier, relied chiefly on the Court of Appeals decision in Martindell.

As we probably all recall, in Martindell the Trial Court ruled upon an informal request by the Government for access to deposition transcripts sealed by a protective order. Before deciding whether to grant such access the Second Circuit Court of Appeals set forth the conflicting factors to be weighed in reaching such determination.

On the other hand, it observed it was the expressed objective of protective orders to secure a speedy and inexpensive determination in civil conflicts by encouraging full disclosure of all evidence that might have any revelance to the litigation. This objective would be serously undermined if witnesses who rely on protective orders cannot be certain of their enforceability.

Against this objective, said the Court, must be weighed the public interest in obtaining evidence necessary for efficient law enforcement. The Court in Martindell found that the latter interest was minimized when the Government was the party requesting access. It held that it would be improper to supplement the "awesome investigative powers" of the Government by granting it access to sealed documents on the basis of an informal request where the deposed parties had forborne their Fifth Amendment right to refuse to testify in specific reliance upon the protective order.

We find for several reasons that the underlying rationale of the Martindell decision to be distinguishable from the Government's present request for access to IDT documents.

In Martindell the Government sought access to transcripts of depositions taken pursuant to a protective order. The basis for the Martindell decision and the clear reliance by the deposed

parties on an express provision in the protective order which prohibited disclosure of their testimony for purposes of law enforcement. As Judge Carter noted in a memorandum endorsement, which is unreported, I believe, of his decision in Carter-Wallace v. Hartz Mountain Industries, Inc., Judge Carter stated as follows:

"Martindell, because the Government was the purported intervenor, involved Fifth Amendment rights. The Second Circuit feared that witnesses would not testify in reliance on a protective order if their testimony were to be made available to the Government for criminal investigatory purposes in disregard of those orders. Absent the special reliance on confidentiality manifested by the Martindell deponents, there is no reason to prevent third party access to transcripts relevant to a subsequent action, especially where a substantial savings of time and money are achieved thereby."

Here, at least with respct to Davis and IDT, the Government is merely seeking to obtain documents which pre-existed both the settlement agreement and the protective order. "The"—and I am quoting from Martindell—"The reliance of a private party upon protection of pre-existing documents from disclosure to the Government would normally be more difficult to justify then that of a witness who would, absent the protective order, have invoked his privilege and given no testimony at all."

Where, as here, the documents being sought by the Government are corporate books and records, such reliance is more difficult to justify in view of the generally accepted rule that an officer of a corporation may not claim that the privilege against self-incrimination would justify refusal to produce corporate documents sought by Grand Jury subpoenas duces tecum directed to either the corporation or the individual corporate officer.

Of course, because this is an oral decision I am not going to cite everything. I must note that the last proposition is butressed by a decision of the Supreme Court in Wilson v. The United States 221, U.S.361, and Dreier v. United States, 221, U.S.394. And, see, also, Bellis v. United States, 417, U.S.85.

Furthermore, Martindell dealt with an informal Government request which the Court found to be an attempt to improperly supplement the Government's "awesome investigative powers." Here the request for access was made pursuant to the Government's use of its express investigative power—a Grand Jury subpoena.

The Court in Martindell noted that it was not called upon to decide whether the Government might be entitled to enforcement of the subpoena compelling production of the deposition. The Martindell panel further noted that its decision in the case is consistent with United States v. GAF Corporation which recognizes, as do we, that in an appropriate case the District Court may upon a proper showing in the exercise of its discretion grant an application by the Government pursuant to its statutory enforcement power for modification of a protective order entered in civil litigation between others to permit inspection of documents covered by the order.

Applying the Martindell balancing approach, we would be compelled to strongly consider the policy of giving broad investigative powers to a Grand Jury in order not to frustrate its investigation. We need not decide here whether such interest would weigh heavily enough in favor of disclosure even where there exists a special type of reliance on confidentiality that was present in Martindell. Nevertheless, in the instant matter, at least with respect to Davis and IDT, that type of special reliance is not present.

The pre-existing documents sought by them are not subject to a Fifth Amendment privilege. Accordingly, Davis and IDT cannot claim to have surrendered any privilege when they produced the documents upon their alleged reliance that they would not be turned over to the Government. This analysis disposes of the claim that Davis and IDT acted in reliance on the settlement agreement as well as on the protective order.

But, perhaps the most compelling distinction between the contested matter here and Martindell is the fact that the Government is seeking the documents from the parties who produced them under the protective order but which were not

bound by that order. While the protective order clearly prohibited the Trusteee from disclosing the sealed documents, it placed no such express restriction on IDT or Davis.

To paraphrase Judge Carter in Carter-Wallace, the subpoenas to IDT and Davis are directed to parties who originally had control of the evidence and who are not bound by the sealing provisions of either the protective order or the settlement agreement which, by their own terms, prohibited disclosure by the receiving party, that is, the Trustee. None of the cases cited by any party support the tenet that a party can avoid a subpoena merely because it disclosed the same material to an adversary bound by a protective order.

I turn now to General Dynamics. The Grand Jury subpoena issued to General Dynamics seeks not only documents submitted in connection with the Rule 205 examinations held pursuant to order of the ancillary Bankruptcy Court in Massachusetts; it requires, as well, the production by General Dynamics of transcripts of the Rule 205 depositions. To the extent that such subpoena encompasses disclosure of a witness' testimony, General Dynamics' reliance upon Martindell facially is more appealing than the unsuccessful dependence of IDT and Davis upon that decision.

As noted earlier, the Martindell panel denied the Government's informal request for "the deposition testimony of witnesses on a matter delicate enough to have counselled the invoking of a claim of constitutional privilege against self-incrimination, which claim of privilege was foregone on an explicit agreement between the parties sanctioned by a protective order for limited use of that testimony," citing United States v. GAF Corporation on the petition for rehearing found in volume 596, Fed. Sec., page 18, Second Circuit 1979.

Of course, the first proposition that invites inquiry is whether the Rule 205 testimony of General Dynamics' witnesses encompassed matters "delicate enough to have counselled the invoking of a claim of constitutional privilege against self-incrimination."

The record before Judge Lavien in connection with the so-called "understanding of confidentiality" entered into between

the Trustee and General Dynamics simply reveals General Dynamics' concern over the dissemination by the Trustee to third parties of "allegations (in the affidavit of Trustee's counsel and the Trustee's memorandum of law) that have been made about individuals of General Dynamics"—that is found at page 36 of the transcript of hearing before Judge Lavien on February 19, 1980—as well as "assertions (therein) of certain 'business crimes' "—also at the transcript of hearing but at page 47 thereof.

It appears, as well, that the "understanding of confidentiality" was entered into with respect to corporate documents of General Dynamics which, presumably, contained confidential business and proprietary material. Thus, the "understanding of confidentiality" here was devised and designed to cloak certain ex cathedra statements by the Trustee concerning the business integrity of General Dynamics, not to insulate the deposition testimony of witnesses.

Moreover, even assuming arguendo General Dynamics' contention that the deposed witnesses here testified upon the reliance of the "understanding of confidentiality" thus foregoing their assertion of their Fifth Amendment privileges, no claim or intimation by any deposed witness has been interposed indicating that any such testimony arguably was self-incriminating.

Even more devastating to General Dynamics' argument in this regard is that even if the deposed witnesses could properly claim a Fifth Amendment privilege, General Dynamics has no standing to assert that privilege on behalf of its employees, citing Flavorland Industries, Inc. v. United States, 591 F.Sec. 524, page 525, a Ninth Circuit determination in 1979.

Finally, and additionally, quite critical to our conclusion that General Dynamics has failed to sufficiently color match the facts here with those in Martindell is that the depositions and documents are being sought from General Dynamics, a party not bound by the "understanding of confidentiality." The transcript of the hearing before Bankruptcy Judge Lavien in Massachusetts reveals that General Dynamics was concerned only with the dissemination by the trustee to the general public of confidential business material.

Accordingly, the Bankruptcy Judge instructed Trustee's counsel not to disclose materials and information designated as confidential. Nowhere in the record is it suggested that General Dynamics was restrained or restricted in any manner with respect to disclosure of materials within the "understanding of confidentiality."

So, if General Dynamics was not bound itself by the "understanding of confidentiality" and is not a party to the settlement agreement, since the terms of the settlement agreement entered into between and among IDT, Davis and the Trustee with respect to documents and other confidential information expressly limited its protective provisions to the originals of such materials in the Trustee's possession, and not copies thereof in IDT's possession, we decline the non-party General Dynamics' invitation to modify the agreement to protect copies of the General Dynamics' deposition transcripts.

Accordingly, the balancing approach as applied to the facts of the instant matter, unlike the result in Martindell, favors the public interest in obtaining all relevant evidence required by the Grand Jury subpoena issued to General Dynamics.

Having found that the protective order and the settlement agreement did not prevent enforcement of the Grand Jury subpoenas issued to Davis, IDT and General Dynamics, we now turn to the group of materials sought directly from the Trustee. These include documents received by the Trustee in his investigation of various parties other than General Dynamics, IDT and their personnel. As such those documents are covered by the sealing provisions of the settlement agreement but neither Davis nor IDT can assert any pre-existing interest with regard to those materials. The Grand Jury needs information relevant to the investigation and, in my view, utilizing the balancing approach again clearly mandates enforcement of those materials in the hands of the Trustee.

Somewhat more complicated is the argument by Davis that the doctrine of equitable estoppel bars enforcement of any of the subpoenas. Until recently, it was well established that estoppel could not be invoked against the Government. I am not

going to give the citations; that I will save for whatever is left or forever what happens to be saved—not very much.

The Supreme Court in recent years has indicated that under certain circumstances the Government might be subject to the dictates of that doctrine. However, the Court did not indicate what that type of conduct by a Government employee would acceptably give rise to the application of estoppel and, indeed, has restrained from deciding whether even affirmative misconduct would estop the Government.

Although the Ninth Circuit has shown a willingness to permit estoppel to be asserted against the Government in certain circumstances—and I have cited such decision emminating from the Ninth Circuit—the Second Circuit has generally declined to follow that course and was recently reversed when it invoked such an estoppel in Hansen v. Harris. That case is 619 Fed. Sec., 942, and it was reversed sub nom in Schweiker v. Hansen, 450 U.S., 785 in a per curiam decision in 1981.

Lacking conclusive guidance on the question, and I now quote, "we avoid that bramblebush by assuming the application of the doctrine of estoppel if the facts warrant it," citing Precious Metals Association v. Commodity Futures Trading Commision, 620 F. Sec., 900 at page 909, a First Circuit decision in 1980.

Generally, a claim of equitable estoppel is available upon a showing of the following four elements:

1. The party to be estopped must know the facts;

2. He must intend that his conduct shall be acted on or must so act that the party asserting the estoppel has a right to believe it is so intended;

3. The latter must be ignorant of the true facts; and

4. He must rely on the former's conduct to his injury.

Those elements are found in numerous cases. I will just cite a Southern District case—Rosenthal v. National Life Insurance Company, 486 Fed. Sup., 1018 at page 1023, a 1980 decision emanating from this District.

In support of his claim of estoppel, Davis asserts that based on the Government's continued interest in the Frigitemp case it knew all the facts. Further, he asserts, the United States Attorney's Office was given notice of the settlement agreement before it was approved by the Court and as such the Government knew of the sealing provision contained therein.

With respect to the Government's conduct, Davis asserts that the Government's failure to object to the sealing provision contained in the settlement agreement amounted to an acceptance thereof on which Davis had a right to rely.

As to element three—and I refer you to the four elements that I just mentioned now—it must be ignorant of the true facts. Davis claims that when the Government accepted the sealing provisions it intended to issue the instant subpoenas and overturn the sealing provisions. Finally, Davis alleges detrimental reliance in that he paid one million four hundred thousand dollars for provisions in the settlement agreement which the Government is now attempting to overturn.

The Assistant United States Attorney seeking enforcement of the subpoenas argues that he did not have knowledge of all the facts. He claims that only the Civil Division of the United States Attorney's Office received notice of the settlement agreement and that notice of settlement did not even mention the sealing provision; that by its silence the Government did not disclaim any interest in the sealed documents; and that the decision to issue the subpoenas was based on facts that had only recently come to the Government's attention.

The record before us is insufficient to support a determination of whether the Government had knowledge of the sealing provisions or whether at the time of the settlement agreement was approved the Government intended to issue the subpoenas. For the purposes of resolving the issue at hand, we will assume the existance of the first and third elements necessary to demonstrate equitable estoppel.

Our attention is, this, focused on the conduct of the Government which, allegedly, gave rise to the claim of estoppel, i.e.,

its failure to object to the settlement agreement. I now quote from a decision in the Southern District of New York entitled Redington v. Hartford Accident & Indemnity Company, 483 F. Sup.83, at page 86, and the quotation is as follows:

"It is well settled that the sine que non of an estoppel is some inequitable or fraudulent conduct engaged in by the party sought to be estopped which is reasonably relied upon by the other party to his detriment."

Mere silence or failure to respond does not amount to estoppel conduct. That is the Precious Metal Association case I cited earlier.

For a party to be estopped on the basis of its silence it must have "a duty to speak." In the instant case the Government was not a party to the settlement agreement. It, therefore, had no "duty to speak" and no obligation to voice any objections.

Thus, Davis has failed to demonstrate such conduct on the part of the Government that would give rise to a claim of estoppel. Separate and distinct from the claim of estoppel is Davis' argument that the doctrine of laches bars the Government from seeking any of the subpoenaed materials. In support of this claim Davis asserts that the Government's four-year delay in seeking the subpoenaed materials is inexcusable and has resulted in prejudice to Davis.

It is well established, says a Supreme Court decision—not I, necessarily—but, it is well established that "the United States is not subject to the defense of laches in enforcing its rights."

That case is United States against Summerlin, 310 U.S., 414 at page 416, a 1940 decision. There are several other cases cited. We note that even if the Government was not immune to a claim of laches, the facts here do not support invocation of the doctrine. Firstly, Davis, has failed to demonstrate that in delaying to seek the subpoenaed material the Government was negligent in pursuing its criminal investigation of Frigitemp.

Although the record before us is insufficient for us to support a determination of whether the delay is, in fact, inexcusable, we

doubt whether it is appropriate for a private party to tell the Government at wat pace it should pursue an investigation.

More importantly, however, Davis has failed to establish the type of prejudice that would support a claim of laches the fact that Davis paid one million four hundred thousand dollars for the settlement agreement and the sealing provisions contained therein was not a result of the Government's delay in seeking the materials. See, for example, Emle Industries, Inc. v. Patendex, 478 F. Sec. 562 at page 574, a Second Circuit 1973 decision.

Therefore, finally and in conclusion, we hold that enforcement of the Grand Jury subpoenas issued to Davis, IDT and General Dynamics is not barred by either the protective order of the Massachusetts Bankruptcy Court or the settlement agreement approved by this Court. Further, we direct the Clerk of the Court to permit the Grand Jury access to the materials sought by the subpoena issued to the Trustee.

Finally, the application of General Dynamics for modification of the settlement agreement is in all respects denied. The Government is directed to settle an order on notice in conformity with the determination of this Court.

MR. DENTON: May I be heard briefly, Your Honor?

THE COURT: Yes.

MR. DENTON: Does Your Honor have any estimate when your written opinion would be ready and filed?

THE COURT: To use a term that I used in this opinion, the record is insufficient.

MR. DENTON: I raise that for this reason: we really do have two parts to this application and one is enforcement of the Grand Jury subpoenas which we intend to proceed with forthwith. To that end I will state for the record we would expect compliance with all of the withheld items by the close of business one week from today. Otherwise, we shall seek enforcement in the District Court.

With respect to the sealed items, I think that that can wait until your written opinion. One reason is that I believe compliance with the Grand Jury subpoenas may place the bulk of those materials and then we can determine what are those minimal items left.

THE COURT: I will tell you—I don't know whether it has to be on the record or off the record—the problem that has been plaquing me vis-a-vis getting the decision, this decision among other decisions, out and that is that my secretary's mother has been in extremis for several months. Why she is still alive is something that cannot be determined by medical authorities. The fact is she still is and my secretary is in and out of the office. Worst of all, if the inevitable occurs within the next few days, or so, that will necessitate the absence of my secretary.

So, I can't, and I think it is unfair to tell you it will be out in a week. There is no reason why it can't be out in two days under normal circumstances. That's my problem and that's what necessitated my calling all the parties. To some extent I have been living with this problem for several months.

I can tell you that I will move this ahead of all other decisions to be typed.

MR. DENTON: Very well. As I said, we can wait a period of time on those items for compliance with the subpoenas. As I previously indicated to Your Honor, we would like to devise a procedure that would insulate our criminal proceeding from the immunization testimony of Mr. Davis.

THE COURT: I should note although I intended to originally give a short summary of the decision from the Bench I have, in essence, given the decision from the Bench less several footnotes. In essence, this is it.

MR. DENTON: Very well.

THE COURT: I will, however, move with all deliberate speed.

MR. GARDNER: If I could say one thing. I wouldn't want our silence to be regarded as an assent to the compliance question. I think we have to have discussions.

MR. DENTON: The subpoena has been outstanding since February.

THE COURT: I don't know that I have to deal with this.

MR. DENTON: I have stated on the record the time frames within which we would intend to have compliance. Otherwise we will seek our remedies.

THE COURT: Very well. Gentlemen, thank you.

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

SEALED ORDER
7 B 468

In Re
FRIGITEMP CORP.,

BANKRUPT.

Upon consideration of the applications of the United States and of General Dynamics Corporation, and in accordance with the Court's oral decision read into the record on September 21, 1982, the court finds that enforcement of Grand Jury subpoenas *duces tecum* issued to George G. Davis ("Davis") Intersystems Design and Technology Corporation ("IDT"), and General Dynamics Corporation, is not barred by any protective orders previously entered in this matter, nor by the Settlement Agreement between the Trustee of Frigitemp Corp., IDT and Davis, filed on April 19, 1981 ("the Settlement Agreement"); and it is further

ORDERED, that the Clerk of this Court is directed to permit access by the United States Attorney, for transmittal to the Grand Jury, to the materials sealed and deposited with the Clerk pursuant to the terms of the Settlement Agreement; *provided*, that the United States Attorney shall make appropriate arrangement to prevent the disclosure to the Grand Jury or to any Government personnel assigned to the criminal investigation of this matter, of the Rule 205 examination of George G. Davis, previously sealed by order of this court dated September 5, 1980, as well as any testimony, documents or other investigative leads or fruits derived therefrom; and it is further

ORDERED, that the application of General Dynamics Corporation for modification of the Settlement Agreement to include xerographic or carbon copies of rule 205 examination

transcripts and materials held by General Dynamics or its personnel is hereby denied; and it is further

ORDERED, that this order and all proceedings and documents filed herein shall remain sealed and disclosed to no persons other than the parties and such of their attorneys as may be necessary to the execution of this Order, until further order of the Court.

Dated: New York, New York
September 29, 1982

SO ORDERED:

JOEL LEWITTES
Unites States Bankruptcy Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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78 B 468 (JL)

IN RE FRIGITEMP CORP.,

Bankrupt.

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82 Civ. 6945 (VLB)
ORDER

GEORGE G. DAVIS AND IDT CORP.,

Appellants,

-against-

UNITED STATES OF AMERICA,

Appellee.

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82 Civ. 7002 (VLB)

P. TAKIS VELIOTIS,

Intervenor-Appellant,

-against-

UNITED STATES OF AMERICA,

Appellee.

VINCENT L. BRODERICK, U.S.D.J.

George G. Davis, Intersystems Design and Technology Corporation ("IDT"), and intervenor P. Takis Veliotis have appealed from an order of Bankruptcy Judge Joel Lewittes

1) which held that enforcement of grand jury subpoenas *duces tecum* issued to Mr. Davis, IDT and General Dynamics Corporation was not barred by protective order nor by a settlement agreement dated April 29, 1981; and

2) which directed the Clerk of the Bankruptcy Court to permit access by the United States Attorney, for transmittal to the

grand jury, to certain materials sealed and deposited with the Clerk pursuant to a settl ement agreement; and

3) which denied an application by General Dynamics Corporation to modify the settlement agreement.

Judge Lewittes' order is affirmed.

SO ORDERED.

Vincent L. Broderick, U.S.D.J.

Dated: New York, New York
November 12, 1982

Office - Supreme Court, U.S.
FILED
JUN 21 1983
ALEXANDER L. STEVAS,
CLERK

NO. 82-2015

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

GEORGE G. DAVIS, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

MEMORANDUM IN REPLY TO THE MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

GEORGE G. DAVIS, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

MEMORANDUM IN REPLY TO THE MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

The Government is forced to concede it had notice of the Proposed Settlement Agreement as of April 28, 1982, since it was served on the Government for its review, consent or objection. However, the Government has never admitted it also had notice of the Protective Order and the Sealing provisions. The Government has always relied, as it continues to rely on page 3, in a footnote, of their Memorandum, that the record is insufficient to establish that fact. The Government refuses, and continues to refuse, to supply information as to whether it had notice, or did not have notice of the sealing provisions. It has not done so before the Bankruptcy Court, the District Court, the Second Circuit, and, now, before this Court. It is submitted the Government has avoided this issue because there is sufficient evidence to show it was aware of the Protective Order when it consented to the Rule 7-B designation of Davis as set forth in more detail at pages 3 and 4 of the Petition filed by Davis with this Court. As noted, Assistant United States Attorney Carey in his letter of September 5, 1980, requested the Bankruptcy Court to place severe sanctions on the use of access, by the United States, of both the testimony of Davis, and the documents used during the testimony under the Rule 205 designation. The reason for this action is clear, in that the Government did not want to immunize Davis by gaining access to

his testimony, or the documents used. The Government was aware of the sealing provisions as early as September 5, 1980, and, again, on April 28, 1982, when the Settlement Agreement was submitted to the Government. The Settlement Agreement incorporated those same sealing provisions which Assistant United States Attorney Carey demanded for the Government's protection.

It is the Solicitor General's position, as well as that of the Second Circuit that only affirmative misconduct by governmental employees can estop the Government. Nowhere in the Solicitor's memorandum is there any reference to Santiago v. Immigration and Naturalization Service, 526 F.2d 488 (9th Cir. 1975) which stands for the principle that estoppel can arise where a government employee fails to inform or inquire. Nor is there any reference to the dissenting opinion in Schweiker v. Hansen, 450 U.S. (1981) indicating it is time for this Court to define affirmative misconduct. When these opinions are considered, together with the recognition by the Second Circuit that there is a conflict with that of the Ninth Circuit as to what action by a government employee will constitute estoppel, Goldberg v. Weinberger, 546 F.2d 477 (2d Cir. 1978), it is time to consider this issue.

Matthew L. Byrne
Counsel of Record

Office - Supreme Court
FILED
JUN 21 1983
ALEXANDER L. STEVAS,
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NO. 82-2015

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

GEORGE G. DAVIS, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY IN OPPOSITION TO THE MOTION TO EXPEDITE CONSIDERATION OF THE PETITIONS

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MATTHEW L. BYRNE, ESQ., Hollman & Byrne, on behalf of the Petitioners GEORGE G. DAVIS and I.D.T. CORPORATION, oppose the Motion of the Solicitor General to expedite consideration of the petition for a Writ of Certiorari in this case. The petition in No. 82-2015 was filed on June 10, 1983.

Our Reply Memorandum to the Memorandum of the United States in Opposition to our Petition for a Writ of Certiorari, received by our office on June 17, 1983, is being filed in typescript (to be followed by printed copies) with this reply on June 21, 1983, setting forth our response to the Government's Memorandum.

Our opposition to the instant Motion of the Government for an expedited consideration of our Petition for Certiorari is based on the following factors:

1. The Government states that the term of the Grand Jury investigating this matter expires on September 8, 1983. It is respectfully submitted that this fact should not serve on a basis for expediting consideration of our Petition for Certiorari, since it is within the power of the Government to convene a second Grand Jury if our Petition is not

decided by the expiration date of the current Grand Jury. While this might necessitate reconsideration of the evidence already collected, such fact should not serve as a reason for denying Petitioners the normal amount of time the court might otherwise devote to a full consideration of all of the issues raised in our Petition.

2. The Frigitemp Bankruptcy was filed on March 3, 1978 and shortly thereafter the investigation by the United States Attorney for the Southern District of New York as well as the Securities and Exchange Commission was initiated. Now, more than five years after the commencement of the investigation, the Government seeks a "rush to judgment" on the grounds that the term of a Grand Jury, which can readily be replaced by another Grand Jury, is about to expire. The Government seeks to remedy their delay by having the Court deny Petitioner the amount of time that would, in the normal course of events, be devoted by the Court to consideration of the Petition. Any delay, as evidenced by the length of time this matter has been under investigation, and any problems attendant thereto, are solely the responsibility of the Government and they, not the Petitioner, should bear the responsibility and any attendant inconvenience to the Government that results therefrom.

3. The issue presented in this case as to what type of misconduct or fraud on the part of the Government can give rise to estoppel being applied to the Government is a complex one and, it is respectfully submitted, deserves the reasoned consideration of the Court in the light of the voluminous facts of the case and should not be subject to an artificial time schedule set by the Government simply because it may prove inconvenient for the Government if a decision on the Petition is not made before the expiration date of the Grand Jury.

4. On or about the time of submission of the instant Petition for Certiorari, certain facts relative to the Government's actions in this case became known which further demonstrate the misconduct of the Government in this case.

5. On October 2, 1981, the U.S. Department of Justice wrote to the Central Authority of Switzerland requesting their assistance under a certain Treaty of Mutual Assistance in Criminal Matters. The request stated copies of certain records of Swiss Bank Accounts were needed by the Department of Justice in connection with a Criminal Investigation. The Treaty under which the records were requested provides that records requested thereunder can only be used in connection with certain types of Criminal Investigations and for no other purpose.

6. The Government then requested the Swiss Authorities to block certain Swiss Accounts on the grounds that they represented funds illegally obtained. The Government was required under Swiss Law to produce evidence of the allegations of illegal activity by a certain date or the funds would not remain blocked. After several extensions of time in which to submit their evidence had been granted, the Government failed to produce the evidence they allege they had, so the blocking under the Treaty of Mutual Assistance was lifted. However, the Government then instituted a Civil Suit in Switzerland claiming to be a Creditor and again had the funds attached under a Swiss Civil Procedure. The Government then requested and was granted several extensions of time to submit evidence to support their Civil Suit and again failed to meet the deadline dates established by the Swiss Courts. Finally, the Swiss Government directed Counsel for the Civil Defendant to file an answer to the complaint. The Answer was filed and demanded the suit be dismissed on the grounds that the Government had never submitted any evidence in support of their claim despite the fact that over a year had passed

since the Government originally filed suit. The Government then advised the Swiss Authorities on May 27, 1983 that the Trustee in Bankruptcy for the Frigitemp Estate had commenced a Civil Action in the United States against a number of individuals and companies that he alleged engaged in fraudulent conduct resulting in fraud on Frigitemp. The Government requested a stay of all Civil Proceedings in Switzerland until completion of the Trustees' Civil Case on the grounds that the evidence adduced in that case was needed by the Government to prove its case in Switzerland. The Swiss Courts have not as yet ruled on the most recent application of the Government for a further stay.

7. On or about June 8, 1983, we were advised that the U.S. Government had turned over to the Frigitemp Trustee in Bankruptcy certain of the banking records obtained pursuant to the Treaty of Mutual Assistance in order to permit the Trustee to file a Civil Suit in the United States. The turnover of these documents constitutes a breach of the Treaty of Mutual Assistance and is in violation of the request for assistance filed by the Government with the Swiss Authorities on October 2, 1981. Furthermore, the Government, when it requested a stay of the Civil proceedings in Switzerland, never advised the Swiss Government that the Trustee's lawsuit was based on Swiss Banking Records obtained by the Government under the Treaty of Mutual Assistance and then turned over to the Trustee in violation of that Treaty. A formal protest is being prepared to be lodged with the Swiss Government in connection with this matter.

8. We bring this matter to the attention of the Court as illustrative of the type of misconduct the Government is engaging in relative to this matter. Petitioner is attempting to develop the facts, which the Government has

concealed, for consideration by this Court in connection with this Petition.

Respectfully submitted.

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